LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 24 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1964.

No. 15

NATIONAL LABOR RELATIONS BOARD,

versus

BURNUP AND SIMS, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

ERLE PHILLIPS,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303,
GEOFFREY B. DOBSON,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303,
Attorneys for Respondent.

INDEX.

	Page
STATUTE INVOLVED	1
QUESTION PRESENTED	2
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
Point I. The question of good faith or of the power of the Board to order reinstatement as a remedy for a layoff in spite of a lawful discharge is not before this court	7
Point II. The Court of Appeals properly held that where an employee is discharged as a result of a good faith but mistaken belief of the employer that the employee has engaged in misconduct, no violation of Section 8 (a)(3) has taken place	10
A. Motive is an essential element of a violation of Section 8 (a)(3)	10
B. The rule of mistaken belief applied in cases involving the reinstatement of strikes is inapplicable to the present situation	15

INDEX—(Continued):

Page

ARGUMENT—(Continued):

Point III. A discharge based on a good faith but mistaken belief that an employee has engaged in misconduct does not constitute a violation of Section 8 (a)(1) 19

A. The Board's finding of a Section 8 (a)(1) violation interferes with respondent's right to make a reasonable business judgment 19

B. The Board exceeded its power to draw reasonable inferences in finding a violation of Section 8 (a)(1) 22

Point IV. There is an industrial right of self-defense 24

CONCLUSION 26

APPENDIX 29

CITATIONS.

Cases:

Allis-Chalmers Mfg. Co. v. National Labor Relations Board, 162 F.2d 437 (7th Cir., 1947) 11

Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937) 19

Bonnar-Vawter, Inc., 129 NLRB 127 (1960), affirmed 289 F.2d 133 (1st Cir., 1961) 16

Cusano v. National Labor Relations Board, 190 F.2d 898 (3rd Cir., 1951) 15, 16

CITATIONS—(Continued):

Page

Cases—(Continued):

J. I. Case Co. v. Borak, ... U.S. ...., 12 L.ed. 2d 423 (1964) 10

Local 357, I. B. of T.,C.,W. & H. v. National Labor Relations Board, 365 U.S. 667 (1961) ..10, 12, 22

Midcontinent Petroleum Co., 54 N.L.R.B. 912 (1944) 17

Namet v. United States, 373 U.S. 179 (1963) 10

National Labor Relations Board v. Adkins Transfer Co., 226 F.2d 324 (6th Cir., 1955) 11

National Labor Relations Board v. Condenser Corp., 128 F.2d 67 (3rd Cir., 1942) 11

National Labor Relations Board v. Erie Resister Corp., 373 U.S. 221 (1963) 12, 16, 18

National Labor Relations Board v. Industrial Cotton Mills, 208 F.2d 87 (4th Cir., 1953) 15, 16, 17

National Labor Relations Board v. Illinois Tool Works, 153 F.2d 811 (7th Cir., 1946) 21

National Labor Relations Board v. James Thompson & Co., 208 F.2d 743 (2nd Cir., 1953) .. 14

National Labor Relations Board v. John S. Swift Company, 277 F.2d 641 (7th Cir., 1960) .. 15

National Labor Relations Board v. Kaye, 272 F.2d 112 (7th Cir., 1959) 15

National Labor Relations Board v. McCatron, 216 F.2d 212 (9th Cir., 1954) cert. denied 348 U.S. 943 .....21, 23, 24

National Labor Relations Board v. McGahey, 233 F.2d 406 (5th Cir., 1956) 11

National Labor Relations Board v. Mylon-Sparta Co., 166 F.2d 485 (6th Cir., 1948) 20

CITATIONS—(Continued):

Page

Cases—(Continued):

National Labor Relations Board v. Prince Macaroni Manufacturing Co., 329 F.2d 803 (1st Cir., 1964) 15

National Labor Relations Board v. Ray Smith Transport Co., 193 F.2d 142 (5th Cir., 1951) 23

National Labor Relations Board v. Standard Coil Products Co., 224 F.2d 465 (1st Cir., 1955), cert. denied 350 U.S. 902 11

National Labor Relations Board v. Truck Drivers Local Union, 353 U.S. 87 (1957) 25

National Labor Relations Board v. United Parcel Service, Inc., 317 F.2d 912 (1st Cir., 1963) .11, 20

Radio Officers' Union, etc. v. National Labor Relations Board, 347 U.S. 17 (1954) 10, 12, 23

Rapid Roller Co. v. National Labor Relations Board, 126 F.2d 452 (7th Cir., 1942), cert. denied 317 U.S. 650 21

Raytheon Company v. National Labor Relations Board, 326 F.2d 471 (1st Cir., 1964) 14

Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793 (1945) 12

Rubin Bros. Footwear v. National Labor Relations Board, 203 F.2d 486 (5th Cir., 1953) 15, 20

Trailmobile Co. v. Whirls, 331 U.S. 40 (1947) .. 8

Underwood Machinery Co., 74 N.L.R.B. 641 (1947), affirmed 179 F.2d 118 (1st Cir., 1949) 11, 17

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) 14

CITATIONS—(Continued):

Page

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

Section 2 (3) 5, 15, 18
Section 7 19
Section 8 (a)(1) 6, 13, 19, 21, 22, 24
Section 8 (a)(3) 5, 6, 10, 14, 15, 18, 23
Section 10 (c) 9
Section 13 ..... 5, 15, 16, 18

Florida Statutes § 790.162 (1963) 18

Miscellaneous:

An American Legal Dilemma—Proof of Discrimination, 17 University of Chicago Law Review, 107, 109 11

1 Harper & James, The Law of Torts, 239 25

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1964.

No. 15.

NATIONAL LABOR RELATIONS BOARD,

versus

BURNUP AND SIMS, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, p. 29.

QUESTION PRESENTED.

Whether an employer, completely free from discriminatory motive, violates the National Labor Rela-

tions Act by discharging two employees it believed in good faith threatened to dynamite employer's property in the course of soliciting union membership.

STATEMENT.

The question here presented arises out of the discharge of two employees, Robert J. Davis and Joseph H. Harmon, who were on layoff status [R. 82]. During the period in which they were laid off, both Davis and Harmon engaged in organizing activities [R. 92, 100]. During this time another employee, Lyle Pate, came to Doyle Tawney, General Superintendent for the Employer, and told Tawney that two men had told him they would dynamite the Employer's storage silos [R. 190]. Pate identified them as Davis and Harmon [R. 191]. At that time he stated that Harmon had made the actual threat [R. 192]. Mr. Tawney then related the incident to Mr. Moritz [R. 192], the man in charge of the Employer's operations at the particular plant [R. 135].

Some time later when the Employer's lawyer, Mr. Muller, was present, Pate was called into the office where a statement was taken down [R. 193]. This statement alleged that Davis and Harmon had come to Pate's trailer to talk to him about the union. At about the end of the talk Davis allegedly said:

> "If the union doesn't get in, we're going to use some dynamite to make sure that those who didn't vote for it won't work either; we'll blow the gravel bins over and make sure that no one works." [R. 206]

Tawney then took Pate and had the statement notarized [R. 177].

Previously, only several days before he had been laid off, Harmon had helped in setting off dynamite in one of the trucks to blast out concrete. This entailed drilling, placing the charge, pinning it, and setting the charge off. Harmon had volunteered to assist in this project [R. 104].

In the meantime, both Harmon and Davis had learned that it was alleged that they had threatened to destroy company property. In the case of Davis, he had "heard men talking about it." Among these was Joe Harmon who told Davis, "I heard a rumor that you're going to blow up the Company" [R. 91]. In addition, John McKnight, another employee who was on layoff status [R. 82], told him that someone had signed an affidavit to the effect that he, Davis, had made a serious threat against the Company [R. 92]. In the case of Harmon, a government lawyer told him that he had been accused of making or condoning the threats [R. 109].

Following the events just narrated, the Company sent both Harmon and Davis letters discharging them. The letters advised each:

> "When you were laid off on September 29, 1961, it was with the understanding that business in your particular job was slow and that you would have 'first call' on any job that came available once business picked up.

"Business is now picking up, but I regret to advise you that I cannot re-employ you.

"It has come to my attention that you made or condoned serious threats to damage property of the Company should the Union fail to win its election. Under such circumstances, I cannot re-employ you with our Company." [R. 201, 202]

Neither Davis or Harmon answered the letter or attempted to communicate with the Company [R. 88, 105]. In the meantime, McKnight was rehired [R. 131] and given a new truck [R. 196].

Moritz testified that he did not re-employ Davis and Harmon because of the serious threats [R. 131]. Both the Trial Examiner and the Court of Appeals so found [R. 40, 212-213].

SUMMARY OF ARGUMENT.

I. The Board in its brief has drawn several issues which Respondent contends are not properly before this Court because they were not raised in the petition for certiorari. These issues which should not be considered are questions going to the existence of the Employer's good faith in discharging the two employees involved in this case, Harmon and Davis, and the question of whether the Board might properly order reinstatement of the two employees assuming that they were lawfully discharged. Respondent believes that because these questions were not raised in the petition for certiorari, Petitioner is precluded from raising them now.

II. The Respondent contends that its discharge of the two employees in question did not constitute a violation of Section 8 (a)(3) of the Act. This is for two reasons:

A. The Respondent believes that motivation is an essential element of a violation of Section 8 (a)(3) of the Act. The employer may discharge an employee for any reason or for no reason at all so long as he is not motivated by the employee's engagement in protected activities. In the instant case, it is contended a motivation completely aside from unionism motivated the employer. The mere fact that the employer was erroneous in the reasons behind his motivation does not destroy it. Even so, the employer was reasonable in his mistaken belief. But this is not the question, the question is what the employer believed. Because the employer acted because of the mistaken belief, he was not guided by a discriminatory motive.

B. Respondent contends that the cases relied upon by the Board for the proposition that a good faith but mistaken belief will not be a defense to a Section 8 (a)(3) charge are inapplicable to the present situation because they are based on the Act's solicitude for the right to strike. The Respondent believes that the distinction rests on the commands of Sections 2 (3) and 13 of the Act. The distinction has been recognized by the Board itself and by the courts applying the rule relied upon by the Board.

III. Respondent urges that its conduct in discharging the employees in the good faith belief that they either made or condoned threats to dynamite the Respondent's plant cannot be the basis for a Section 8 (a)(1) charge independent of any violation of Section 8 (a)(3). This is for two reasons:

A. The employer having to bear the risk of the truth or falsity of the allegations must make the decision as to whether he is to bear this risk. This is a part of the "business judgment" doctrine. This doctrine, although alluded to by the Board, has either been misconstrued or ignored by it. The Board's analysis fails to understand the basic nature of Section 8 (a)(1). Section 8 (a)(1) contemplates something more than a mere encouragement or discouragement of union status. The present case is at the most a mere showing of some possible foreseeable discouragement of union status and as such does not constitute interference, restraint or coercion.

B. The Respondent believes that the Board in finding a violation of Section 8 (a)(1) exceeded its power to draw reasonable inferences by, in this case, basing its finding of a violation, on an inference based on an inference which was in turn based on a third inference. Further, Respondent points out that a mistaken belief on the part of employees as to Respondent's motivation will not, as contended by the Board, make an otherwise lawful discharge unlawful. But aside from this, the Board's inferences are not supported by any evidence.

IV. Finally, Respondent urges that this Court has recognized that the employer has a right to undertake action for the defense of his legitimate interests so long as this right is not used retalitorily to injure the union. In exercising this right, the employer may act upon the facts as they appear at the time, rather than as they turn out to be with the benefit of hindsight. In the instant case, Respondent contends the safety of the plant and of the other employees was such a legitimate interest which Respondent was justified in protecting without penalty.

ARGUMENT.

POINT ONE.

THE QUESTION OF GOOD FAITH OR OF THE POWER OF THE BOARD TO ORDER REINSTATEMENT AS A REMEDY FOR A LAYOFF IN SPITE OF A LAWFUL DISCHARGE IS NOT BEFORE THIS COURT.

Preliminarily, several brief points should be made before entering into the argument proper. These points deal with the question of whether certain issues injected into this case in Petitioner's Brief, not raised in the petition for certiorari may not be considered.

Beginning on page 31 of its Brief, the Board argues that "the facts accepted as true by the Court of Appeals in this case would not, under any proper view, constitute 'good faith'. In addition, beginning on page 32 of its Brief, the Board argues that:

> "The Court of Appeals erred in assuming that respondent's 'motivation was the belief that men had threatened to dynamite property; the intent was to rid the plant of those from where the threat was believed to have emanated.' (R. 214.) This assumption was directly contrary to the Board's findings of fact that the allegations of misconduct were merely a pretext for discharging the men because of their union activity."

In its petition for certiorari, these points were specifically waived by the Board. On page 6 of its Petition in footnote 6, referring to the Court's conclusion that the Company in "good faith" thought Harmon and Davis to have engaged in misconduct, the Board states:

> "The Court thus in effect rejected the Board's alternative finding that misconduct was only a pretext for the discharges (see supra, p. 4). The propriety of this action is not questioned here."

This Court has long held that questions not raised in the petition for certiorari are not before the Court. In *Trailmobile Co. v. Whirls*, 331 U.S. 40, 48 (1947), this Court stated:

> "At the outset, it is important, in view of certain questions which have been injected beyond the issues presented for decision, to state explicitly what is not before us. In the first place, we are not required to determine whether the class suit in the state courts constituted an adjudication of the rights of the parties involved in this litigation. That question was presented to the District Court and the Circuit Court of Appeals. Both determined it adversely to petitioners, but

no error was assigned to this ruling in the petition for certiorari. The question is therefore not before this Court and we express no opinion concerning it."

It is submitted, therefore, that the question of the Respondent's good faith or whether this was but a pretext is not now properly before this Court.

Similarly, in reference to the argument made beginning on page 33 of the Board's brief that the Board may properly order reinstatement of employees improperly laid off and who are subsequently discharged as the result of a good faith but mistaken belief that they have engaged in improper conduct, it is again noted that this is a point not properly before this Court.

Nowhere in the petition for certiorari does the Board raise the question of whether the Board's remedy was the appropriate one for the previous discriminatory layoff. The only question raised was whether discharge because of a good faith but mistaken belief of improper activities constitutes a violation of the National Labor Relations Act when the employer knows that the employees are engaged in solicitation for union membership. See Petitioner's petition for certiorari, page 2. Nowhere in the petition does the Board raise the question of the construction of Section 10 (c) of the Act.

It is submitted, therefore, that the questions of "good faith" and of the power of the Board to order reinstatement in spite of the subsequent discharge

are not properly before this Court. See *J. I. Case Co. v. Borak*, ... U.S. ...., 12 L.ed. 2d 423 (1964); and *Namet v. United States*, 373 U.S. 179, 190 (1963).

POINT TWO.

THE COURT OF APPEALS PROPERLY HELD THAT WHERE AN EMPLOYEE IS DISCHARGED AS A RESULT OF A GOOD FAITH BUT MISTAKEN BELIEF OF THE EMPLOYER THAT THE EMPLOYEE HAS ENGAGED IN MISCONDUCT, NO VIOLATION OF SECTION 8 (a)(3) HAS TAKEN PLACE.

A. Motive Is An Essential Element Of A Violation Of Section 8 (a)(3).

As this Court pointed out in *Radio Officers' Union, etc. v. National Labor Relations Board*, 347 U.S. 17, 43 (1954),

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8 (a)(3) and its predecessor."

The test of whether Section 8 (a)(3) has been violated is the "true purpose" or "real motive" of the employer.[1] For, as noted by Mr. Justice Harlan:

> "In general, this court has assumed that a finding of a violation of § 8 (a)(3) or § 8 (b)(2) requires an affirmative showing of a *motivation*

1 *Local 357, I.B. of T.,C.,W. & H. v. National Labor Relations Board*, 365 U.S. 667, 675 (1961).

of encouraging or discouraging union status or activity."[2]

Hence, it has been held that so long as there is no discrimination because of union activities, an employer may discharge or refuse to re-employ one of his employees for a reason, just or unjust,[3] good or bad,[4] reasonable or unreasonable,[5] fair or unfair,[6] or no reason at all.[7] In short, "the essential element of discrimination in its legal context is the mental process of the alleged discrimination."[8] Of course, this is not to be confused with the rule that a good business reason never justifies unlawful discrimination. See *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 162 F.2d 435 (7th Cir., 1947). The distinction lies in that, in one case, the employer acts from a motive aside from unionism, and in the other, he acts because of union membership but "believes he has good business reasons to justify his discrimination." *Allis-Chalmers, supra*, 162 F.2d at 440.

But, the Petitioner urges, where the reason is based on a mistaken reason, proof of motive is not needed;

---

[2] Ibid page 680 concurring opinion.

[3] *National Labor Relations Board v. Adkins Transfer Co.*, 226 F.2d 324, 328 (6th Cir., 1955).

[4] *National Labor Relations Board v. United Parcel Service, Inc.*, 317 F.2d 912 (1st Cir., 1963); *National Labor Relations Board v. McGahey*, 233 F.2d 406 (5th Cir., 1956).

[5] *National Labor Relations Board v. Standard Coil Products Co.*, 224 F.2d 465, 470, (1st Cir., 1955), cert. denied, 350 U.S. 902.

[6] *Underwood Machinery Co.*, 74 N.L.R.B. 641 (1947), affirmed 179 F.2d 118 (1st Cir., 1949).

[7] *National Labor Relations Board v. United Parcel Service, Inc., supra; National Labor Relations Board v. McGahey, supra; National Labor Relations Board v. Condenser Corp.*, 128 F.2d 67, 75 (3rd Cir., 1942).

[8] An American Legal Dilemma—Proof of Discrimination, 17 University of Chicago Law Review 107, 109.

it may be presumed, Petitioner's argument is based on the exception that "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership."[9] This exception is a narrow one.[10] It has been applied, for instance, to "no-solicitation" rules,[11] disparte wage treatment of employees based solely on union membership status,[12] and "super-seniority granted to non-strikers."[13] In each of these, the employer's act, by its very terms, had a destructive impact upon union activity and in reference to intent, the thing spoke for itself. In *Erie Resister*,[14] for instance, the Court stated:

> ". . . super-seniority by its very terms operates to discriminate between strikers and non-strikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted."

In the instant case, not only is there no "destructive impact" upon union activity, but no distinction at all has been made by the employer based on unionism or non-unionism. Indeed, it has been specifically found that the discriminatory motive did not exist; the discharges were based on the mistaken but "good faith" belief that the employees in question had threatened to blow up the employer's sand silo.

---

9 *Radio Officers' Union, supra*, at 45.
10 *Local 357, supra*, p. 680, concurring opinion.
11 *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793 (1945).
12 *Radio Officers' Union, supra.*
13 *National Labor Relations Board v. Erie Resister Corp.*, 373 U.S. 221 (1963).
14 *National Labor Relations Board v. Erie Resister Corp., supra*, at 231.

The Board attempts to draw a distinction between "honest belief" and "good faith" arguing, perhaps, that really all Respondent had was an "honest belief" and not "good faith."[15] This, of course, ignores the essential element, motive, and as previously indicated, it matters not whether the motive is reasonable or unreasonable. But even so, it cannot really be contested that Respondent's belief was reasonable. The following facts might be considered in determining its reasonableness: (1) There were only two parties who knew the truth of the allegation, (a) Pate and (b) Davis and Harmon. Respondent took a sworn statement from Pate. What more could have been done? Should Respondent have asked Harmon and Davis; and if so, what answer could Respondent expect? Yes, I threatened to blow up your sand silo. Of course, Respondent could have waited to see whether they would blow up the silo. Had Respondent questioned Harmon and Davis, it seems highly probable that the Board would have entertained a charge alleging a violation of Section 8 (a)(1) of the Act. (2) But in addition to the sworn statement, Respondent knew that Harmon was skilled in the use of dynamite; he had helped to clean out the inside of a mixer truck with dynamite before; (3) further, there were "rumors" going about that Harmon and Davis had threatened to blow up the silo; and (4) in addition to this, even after the letter of dismissal had been sent, Davis and Harmon never came forward to give their side of the story. While this may not be "legal evidence"

[15] Petitioner's Brief, p. 32.

as to the truth of the accusation, it certainly goes to show the reasonableness of the Respondent's belief. Opposite this there is no direct evidence to show that this was not the Respondent's belief. Indeed, it was found by both the Trial Examiner and the Court of Appeals that this was a good faith belief. In circumstances such as these, going to the credibility of a witness, the ruling of the Trial Examiner is to be given some weight.[16] As the late Learned Hand once stated:

> "'Good faith' is one form of credibility; it means that the motive that actuated the conduct in question was in fact what the actor ascribes it to be: i.e., that what he gives as his motive was in truth his motive."[17]

From this may be seen that reasonableness does not go to good faith. The question is "what the employer believed and not whether the belief was reasonable."[18] But even so, the question of "good faith" is not before this Court. See Point I, *supra*.

Since the employer acted on the basis of a good faith but mistaken belief and was not motivated to discriminate because of union activities, no Section 8 (a)(3) violation has occurred. The Courts of Appeal

---

[16] *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).
[17] *National Labor Relations Board v. James Thompson & Co.*, 208 F.2d 743, 745 (2nd Cir. 1953).
[18] *Raytheon Company v. National Labor Relations Board*, 326 F.2d 471, 475 (1st Cir., 1964).

of three circuits under similar circumstances have so held.[19]

B. The Rule Of Mistaken Belief Applied In Cases Involving The Reinstatement Of Strikers Is Inapplicable To The Present Situation.

As authority for the proposition that a good faith but mistaken belief will not be a defense to a Section 8 (a)(3) charge where it affirmatively appears that misconduct for which the employee is discharged did not occur, the Board cites *National Labor Relations Board v. Industrial Cotton Mills*, 208 F.2d 87 (4th Cir., 1953) and *Cusano v. National Labor Relations Board*, 190 F.2d 898 (3rd Cir., 1951). Each of these cases involved the question of a discharge of a striker. The basis of the decision in those cases, Respondent submits, are Sections 2 (3) and 13 of the Act. For as pointed out by the Court in *Industrial Cotton:*

> "Section 2 (3) of the Act preserves to strikers their status of employees and Section 13 provides 'nothing in this Act, except as specifically provided for herein, shall be construed so as * * * to interfere with or impede or diminish in any way the right to strike'." 208 F.2d at 91.

The holding of the case was simple:

> ". . . . there is a right guaranteed by the Act—the right of an employee to reinstatement after

[19] *National Labor Relations Board v. Prince Macaroni Mfg. Co.*, 329 F.2d 803 (1st Cir., 1964); *National Labor Relations Board v. John S. Swift Company*, 277 F.2d 641, 645 (7th Cir., 1960); *National Labor Relations Board v. Kaye*, 272 F.2d 112, 114 (7th Cir., 1959); *Rubin Bros. Footwear v. National Labor Relations Board*, 203 F.2d 486 (5th Cir. 1953).

> a strike. That right is not forfeited by the honest but mistaken belief of the employer that the employee has been guilty of strike misconduct, *not misconduct apart from, and having no relation to the strike.*" (Emphasis supplied.) 208 F.2d at 92.

As pointed out by this Court in *National Labor Relations Board v. Erie Resister Corp.*:

> "Section 13 makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress, H. R. Conf. Rep. No. 510, 80th Cong, 1st Sess 59, and § 2 (3) preserves to strikers their unfilled positions and status as employees during the pendency of a strike. S. Rep. No. 513, 74th Cong, 1st Sess 6." (Footnotes omitted.) 373 U.S. at 233.

It appears clear that Congress has intended a "solicitude for the right to strike." *Ibid.*, 373 U.S. at 233-234. Congress has constantly maintained the "integrity of the strike weapon." *Ibid.*, 373 U.S. at 234. Section 13 commands that "the right to strike is to be given a generous interpretation within the scope of the Labor Act." *Ibid.*, 373 U.S. at 234-235. Citing, among others, the *Cusano* case, this Court has noted:

> "The courts have likewise repeatedly recognized and effectuated the strong interest of federal labor policy in the legitimate use of the strike." *Ibid.*, 373 U.S. at 235.

That this is the rationale behind the Board's rule is clearly revealed in *Bonnar Vawter, Inc.*, 129 N.L.R.B.

127 (1960), affirmed 289 F.2d 133 (1st Cir., 1961), which involved the honest but mistaken belief that a striker had placed nails in the employer's driveway. There it was stated:

> "The Board and the courts have been in clear agreement that strike activity protected by Section 7, although it may involve threats, name calling, profanity, and fisticuffs, will not subject the striker to discharge or disqualify him for reinstatement. Even where the action of the strikers involves coercion and restraint and therefore is removed from the shield of Section 7, the Board has been enjoined to consider whether or not reinstatement would effectuate the policies of the Act." 129 N.L.R.B. at 140.

The Board has itself recognized the distinction between an honest but mistaken belief as to strike activities and a mistaken belief as to other concerted activities. Compare *Underwood Machinery Co.*, 74 N.L.R.B. 641 (1947), affirmed 179 F.2d 118 (1st Cir., 1949), involving a mistaken belief as to the existence of a union sponsored slowdown and *Midcontinent Petroleum Co.*, 54 N.L.R.B. 912 (1944), involving a strike situation.

But, aside from this, parenthetically it is noted that the discharge should be upheld. As noted by the Court in *Industrial Cotton, supra,* upon which Petitioner relies, when the mistaken belief is as to the commission of a felony by the discharged employee, reinstatement may not be ordered, 208 F.2d at 90. It is to be noted

that under Florida law the threat to dynamite the property of any person with the intent to damage is a felony punishable by imprisonment in the state penitentiary for twenty years.[20]

To summarize, the cases on which Petitioner relies involve either strike situations in which cases effect must be given to the provisions of Sections 2 (3) and 13 of the Act, or situations in which the employer's action was based on union membership (*Erie Resister*, for example). These cases do not control the problem now confronting the Court. Respondent's action did not violate the Act because for there to be a violation of Section 8 (a)(3), it is essential that the employer's motivation be to discriminate for the purpose of encouraging or discouraging membership in a labor organization.

Thus, a discharge motivated by a good faith but mistaken belief that an employer has engaged in misconduct (which, if true, admittedly is sufficient cause for discharge) unrelated to strike activities does not constitute an unfair labor practice under Section 8 (a)(3) of the Act.

---

[20] Florida Statutes Section 790.162 (1963): "790.162. Threat to throw, place or discharge bomb or other deadly explosives, felony; penalty. It shall be unlawful for any person to threaten to throw, place, or discharge any bomb, dynamite, or other deadly explosive with intent to do bodily harm to any person or with intent to do damage to any property of any person and any person convicted thereof shall be guilty of a felony and punished by imprisonment in the state penitentiary for not more than twenty years."

POINT THREE.

A DISCHARGE BASED ON A GOOD FAITH BUT MISTAKEN BELIEF THAT AN EMPLOYEE HAS ENGAGED IN MISCONDUCT DOES NOT CONSTITUTE A VIOLATION OF SECTION 8 (a)(1).

A. The Board's Finding of a Section 8 (a)(1) Violation Interferes with Respondent's Right to Make a Reasonable Business Judgment.

Petitioner contends that a discharge of an employee based on a good faith but mistaken belief that the employee had committed an act of misconduct in the course of protected activity constitutes a violation of Section 8 (a)(1) if, at the time, the employer knew the employee was engaged in such activity even though the employer had no discriminatory motive [Brief pp. 6, 7].

This is not the law, nor has it ever been. Until now it appeared that:

> "The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees."[21]

The Board contends that in a situation in which employees might believe that a discharge was motivated by anti-union animus, the discharge will interfere with employee rights under Section 7 because "employees would very likely be more hesitant to engage in future

---

[21] *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132 (1937).

protected activity in a plant where one of their members has mistakenly been discharged for alleged misconduct committed in the cause of protected activity." This argument, of course, ignores the rule that membership in a union does not guarantee the member against discharge.[22]

But more important, the rule proposed by the Board impinges on the "business judgment" of the employer. For as the Board concedes "employer action which actually tends to interfere with concerted activity is lawful if it can be shown both that the employer was innocent of anti-union bias and also that he was motivated by business considerations which, on balance, prevail over the employee rights as involved" [Brief p. 16]. The Board then equates "business judgment" with "question of judgment closely touching the proper operation of the plant", such as an employee's efficiency [Brief p. 17]. This ignores, however, the true nature of business judgment. This is the determination of what risks the employer is willing to bear relevant to any given situation. This includes not only whether the employer is willing to risk his money on a new venture, but whether the employer is willing to risk employing an employee who, although satisfactory in all respects, scored low on an aptitude test. For as indicated in *National Labor Relations Board v. United Parcel Service, Inc.*, 317 F.2d 912, 914 (1st Cir., 1963):

---

[22] *Rubin Bros. Footwear v. National Labor Relations Board*, 203 F.2d 486, 488 (5th Cir., 1953); *National Labor Relations Board v. Mylon-Sparta Co.*, 166 F.2d 485, 490-91 (6th Cir. 1948).

> "Whatever, as an abstract proposition, we might think of the wisdom or the 'business judgment' of discharging an employee because of his low score on a twelve minute aptitude test—some fourteen months after the event—and indeed after the employee has in the day-to-day operation of the company's business proven himself satisfactory, nonetheless we must respect the right of a company to make just such a decision. Cf., N.L.R.B. v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); National Labor Relations Board v. Houston Chronicle Pub. Co., 211 F.2d 848, 855 (5th Cir. 1954)."

Similarly, in the instant case, it should be the employer who should decide whether he is willing to take the risk of the accusation being true, for it is the employer, not the Board, who will bear the ultimate risk of its truth or falsity.

The Board's analysis also fails to understand the basic nature of Section 8 (a)(1). Section 8 (a)(1), while not requiring a motive to interfere,[23] contemplates an element of a threat or promise as a part of an overall pattern tending to restrain or coerce.[24] It includes intimidation, but does not amount to duress.[25] However, it is certainly more than encouragement or discouragement of union status. For as indicated by Justice Harlan:

---

[23] *National Labor Relations Board v. Illinois Tool Works*, 153 F.2d 811 (7th Cir., 1946).
[24] *National Labor Relations Board v. McCatron*, 216 F.2d 212 (9th Cir., 1954), cert. denied 348 U.S. 943.
[25] *Rapid-Roller Co. v. National Labor Relations Board*, 126 F.2d 452 (7th Cir. 1942), cert. denied 317 U.S. 650.

> ". . . a mere showing of foreseeable encouragement of union status is not a sufficient basis for finding a violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects."[26]

In this case, however, the Board has equated discouragement with interference, restraint, and coercion, now making unlawful that which was formerly permitted.

It is submitted, therefore, that no violation of Section 8 (a)(1) was committed in that the Employer's discharge of Davis and Harmon was a "reasonable business judgment", reserved to it, and that even if not a business judgment, whatever effect it may have on union activities would be less than interference, restraint, or coercion of employees in the exercise of their Section 7 rights.

B. The Board Exceeded its Power to Draw Reasonable Inferences in Finding of a Violation of Section 8 (a)(1).

As a basis for finding a violation of Section 8 (a)(1) the Board argues[27] that an employee discharged on the basis of a mistaken belief might conclude that he

---

[26] *Local 357, I.B. of T,C,W, & H. v. National Labor Relations Board*, 365 U.S. 667, 679 (concurring opinion).

[27] Brief page 15.

was discharged for engaging in union activity. From this the Board infers the discharged employee's fellow workers would believe this version rather than the employer's. Based on this, the Board further infers that the employees would "likely be more hesitant to engage in future protected activity." From this the Board concludes that the discharge is a Section 8 (a)(1) violation. Upon analysis we find that in reality, this conclusion is based on three inferences; one upon the other: (1) the discharged employee will believe that he was discharged for union activity rather than that he was fired as a result of a mistake; (2) the fellow workers will believe and accept his belief that he was discharged for union activities rather than the reason given by their employer; and (3) the fellow workers will then be more hesitant to engage in concerted activities. While this Court has held that the power to make reasonable inferences based on evidence rests in the Board,[28] it is a well known rule of evidence that inferences may not be based on inferences; presumptions on presumptions. It is submitted that this rule applies to the Board's fact finding powers.[29]

But even if such inferences could be built, one upon the other, the Respondent's actions would not constitute a violation of Section 8 (a)(1). In *National Labor Relations Board v. McCatron, supra*, the situation envisioned by the Board actually occurred. An employee who had been engaged in union activities was

[28] *Radio Officers' Union, supra*, 347 U.S. at 49.
[29] *National Labor Relations Board v. Ray Smith Transport Co.*, 193 F.2d 142, 146 (5th Cir., 1951).

discharged for actual misconduct. His fellow employees mistakenly, but in "good faith," believed that the discharge was for the union activity and they accordingly struck. Some of the fellow workers testified that they believed that they too might be discharged for engaging in union activities. The Court noted that the strike under such circumstances was an economic strike and not an unfair labor practice strike as it would have been had the employer been unlawfully motivated.

Similarly, in the instant case, the employer without an unlawful motive discharged employees. Just as in *McCatron*, the mere fact that employees might believe the discharges were unlawfully motivated does not cause the discharges to become an unfair labor practice.

Aside from this, it is to be noted that there was no evidence introduced at all to show that the employees in the instant case did believe or even tended to believe that the employer was motivated by anti-union animus.

POINT FOUR.

THERE IS AN INDUSTRIAL RIGHT OF SELF-DEFENSE.

We have shown that the Court of Appeals decision in this case was correct, there being no improper motivation on the part of the employer and the discharges not constituting a violation of Section 8 (a)(1) of the Act. In addition, it is appropriate to make one

brief alternative argument, peculiar to the facts of this case.

On page 29 of its Brief, the Board invites an analogy with the law of torts such as battery. It is submitted that such an analogy may be prope.ly made, but such an analogy should be limited to mistakes of fact going to intent or motivation. In other words, for instance, a mistake of identity would be in this case, as in the case of a tort, no defense if the actor intended that which he did, i.e., discharged someone for union activities or hit someone in the nose. Rather, the analogy should be to cases in which the actor took action as a result of that which he believed the other person was planning to do, such as in cases of self defense.

In such cases, it appears clear that a mistake of fact may be a defense.[30] So, too, should the employer have a right to undertake action for the defense of his legitimate interests when he, in good faith, believes that it be in danger so long as it is not used retaliatorily to injure the union. This right to protect legitimate interest was recognized by this Court in *National Labor Relations Board v. Truck Drivers Local Union*, 353 U.S. 87 (1957), called the *Buffalo Linen* case. As in the case of self defense when one may act upon the facts as they appear at the time, so should the employer be justified in acting upon the facts as they appear at the time. Just as the actor in the tort case is not required to investigate further to see if the

[30] 1 Harper & James *The Law of Torts*, 239.

gun is really loaded, the Respondent should be permitted to rely on the facts as they reasonably appear.

It is submitted that there is a right of "industrial self defense" under which an employer may take reasonable actions to protect his legitimate interests. In this case the legitimate interests were the protection of the plant and the lives of the employees.

CONCLUSION.

For the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

By ERLE PHILLIPS,

ERLE PHILLIPS,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303,

GEOFFREY B. DOBSON,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303,
Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this ...1. day of September, 1964, caused a copy of the foregoing Brief for the Respondent to be furnished to the following individuals by depositing same in the U. S. Mail, Air Mail, postage prepaid:

Mr. Archibald Cox,
Solicitor General,
United States Department of Labor,
Department of Labor Building,
14th Street & Constitution Avenue,
Washington 25, D. C.,

Mr. Arnold Ordman, General Counsel,
National Labor Relations Board,
1717 Pennsylvania Avenue, N.W.,
Washington, D. C. 20570.

(S.) ERLE PHILLIPS,
Of Counsel.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq.) are as follows:

Sec. 2. When used in this Act—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained substantially equivalent employment,

* * * *

Sec. 7 Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)

Sec. 8(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain,

or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

* * * *

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.